Brandt-Airflex Corp. *and* Ronald S. Komorowski. Case 22–CA–18655

February 16, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On May 18, 1994, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brandt-Airflex Corp., Readington Township, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

William E. Milks, Esq., for the General Counsel.
James R. Ratliff, Esq., for Brandt-Airflex Corp.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges in substance that Brandt-Airflex Corp. (the Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by having laid off eight employees on August 21, 1992, and by having discharged Ronald Komorowski on August 26, 1992, because of Komorowski's activities as steward for Local 11, International Association of Bridge, Structural, and Ornamental Iron Workers, AFL–CIO (Local 11). The Respondent contends that it laid off the eight employees solely for business reasons and that it discharged Komorowski for reasons unrelated to any of his functions as Local 11's steward.

I heard this case in Newark, New Jersey, on February 3, 1994. On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent is a contractor in the building and construction industry. In its operations annually, it meets the Board's standard for asserting jurisdiction. Local 11 is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In 1992 (all dates hereafter are for 1992 unless stated otherwise), the Respondent was doing iron, sheet metal, and glazing work in various parts of a building being built for Merck Pharmaceutical Company in Readington Township, New Jersey. Half of those of its employees there who were doing just the iron work were members of Local 11. The other half were members of Local 36, an affiliate of the same International with which Local 11 is affiliated. The Respondent's ironworker foreman at the Readington jobsite was Kevin Markowski, a Local 11 member. Komorowski was the Local 11 steward. The Respondent also had a project manager there.

In March, the Respondent's paychecks to the ironworkers at that jobsite were not honored when presented for payment. The Respondent also was delinquent in making contributions to benefit funds due under its contract with Local 11. Komorowski protested several times to the Respondent's project manager. The ironworkers, on one occasion in March, engaged in a brief work stoppage. Several weeks later, the Respondent's president, Frederick Fogelman, came to the jobsite. I credit Komorowski's testimony as to his account of his conversation with Fogelman that day. He told Fogelman that the Respondent was behind in its payments to the Local 11 funds. Fogelman told him that he was mistaken because that matter had been taken care of 3 weeks previously. Komorowski replied that he was a liar because he, Komorowski, had been informed by the Local 11 welfare office the previous day that the Respondent was 5 weeks in arrears. Fogelman got red in the face and told Komorowski to worry more about his job than about the benefit payments.

Later that same day, Fogelman talked to Kevin Markowski, the ironworkers' foreman. Fogelman was agitated. He asked Markowski ''who is this this guy to come up to [me] and talk like this.'' He told Markowski that he, Markowski, should be the one bringing ''a problem with benefits or anything'' to his attention. Markowski replied that it was not his job to deal with benefits, that it was up to Komorowski, as the Local 11 steward, to take care of that matter.

Markowski testified credibly that Fogelman that same day, and on several occasions afterwards, asked how would he go about getting rid of this steward, Komorowski. Markowski told him that the job was winding down and that it would cause too many headaches to remove a steward. Fogelman left without taking action then.

On August 21, the Respondent laid off Komorowski and seven other ironworkers at the Readington jobsite. The only ironworkers it left there then were its foremen, Markowski,

and a Local 11 member.[1] On August 25, Markowski was told by the Respondent's project manager to have Local 11 send Larry McGrath and Mike Gorman back to the jobsite. Local 11 sent Gorman but, instead of McGrath, it sent Komorowski. Local 36 also sent back two ironworkers. Komorowski worked on August 26. On the next day, the Respondent's president, Fogelman, came to the jobsite. When he saw Komorowski there, he told Markowski to discharge Komorowski and to have Local 11 send McGrath. Komorowski was discharged that day. McGrath reported for work on August 27. In mid-September, Merck removed the Respondent as its iron work contractor. As a result, all the ironworkers in the Respondent's employ then were laid off.[2]

Fogelman testified that he made the decision to lay off Komorowski on August 21, and also the decision not to recall Komorowski for work on August 26. Normally, the project manager and the foreman make the decision as to who is to be laid off or recalled. Fogelman's testimony indicates that the reason he made those decisions was that he had, on his visits to the jobsite, observed Komorowski ''basically walking around the job'' and that, when he complained of this to the foreman, Markowski, he was told ''not to get into that.'' No steps were taken by Fogelman on or after those visits to discipline Komorowski. Foreman Markowski's testimony was that he never had a problem with Komorowski's work. I do not credit Fogelman's testimony that he saw Komorowski slacking off. It is unlikely that he would have tolerated nonfeasance by Komorowski when, as the Respondent's own exhibits indicated, Merck Pharmaceutical was putting pressure on the Respondent because the Respondent was falling behind on its iron work contract.[3]

The credited evidence discloses that Komorowski vigorously protested to Fogelman the Respondent's benefit fund delinquencies and that Fogelman harbored a deep resentment against Komorowski therefor. The reason suggested by Fogelman for his decision to discharge Komorowski on August 22—that he had observed Komorowski on prior visits doing nothing, instead of working—was an obvious pretext. Fogelman, when he singled out Komorowski for discharge, bypassed the normal procedure of leaving job-manning requirements to the project manager and foreman. Those considerations, taken together, satisfy me that the General Counsel has made out a prima facie showing that the Respondent discharged Komorowski on August 27 in reprisal for his activities as steward on behalf of Local 11. Under *Wright Line*, 251 NLRB 1083 (1980), the Respondent had the burden of proving that it would have discharged Komorowski on August 27 regardless of his activities as union steward. No credible evidence was presented by the Respondent in that regard. Accordingly, I find that Komorowski was discharged because of his activities on behalf of Local 11.

The General Counsel contends that the Respondent had laid off virtually its whole complement of ironworkers on August 21 in order to cover up its unlawful motive in laying off Komorowski that day. The Respondent in substance asserts that it laid off eight ironworkers that day solely in reaction to pressures being exerted by Merck Pharmaceutical on the Respondent to get iron work done on time or to get off the job. Minutes of meetings between representatives of Merck and the Respondent show that Merck increasingly wanted updates from the Respondent on the progress of its work and that it was, more and more, concerned with the delays encountered by the Respondent in having materials it needed delivered to the jobsite on time. It was in this context that the Respondent laid off virtually all of its ironworkers on August 21. At Merck's direction, it resumed work with the number of its ironworkers reduced by half. In mid-September, Merck replaced the Respondent with another contractor to complete the ironwork.

The General Counsel asserts that a prima facie showing has been made that the Respondent's layoff of eight ironworkers on August 21, and its failure to recall that number were motivated by its animus towards Komorowski. The General Counsel's view is that the very brief period of the layoff and a variance between the explanation given for the layoff by Fogelman in his prehearing affidavit and the one he gave while testifying warrant a finding that the layoff on August 21 was effected to conceal Fogelman's real reason, i.e., his intent to be rid of Komorowski as Local 11's steward. If that were his aim, Fogelman would hardly have waited so long to use such a device. As noted above, he had deferred taking action against Komorowski earlier because of the warning given him by Markowski. At best from the General Counsel's standpoint, the evidence is equivocal. I find that the General Counsel has not sustained the burden of proving that the layoffs on August 21 were more likely attributable to a discriminatory motive than, as the Respondent contends, to an attempt on its part to respond to the pressures being exerted on it by Merck to either bring in the materials and employees needed to bring its job up-to-date or to leave. Accordingly, I find no merit in the allegation in the complaint that the Respondent unlawfully laid off employees on August 21.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 11 is a labor organization as defined in Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act by having discharged its employee, Ronald Komorowski, on August 27 because of his activities as steward on behalf of Local 11 but the Respondent did not engage in an unfair labor practice by its layoff of eight ironworkers on August 21.

[1] There are discrepancies between the names of the employees alleged in the complaint as having been laid off the same day with Komorowski and the names on the Respondent's payroll records of the employees who were laid off on the same day that Komorowski was laid off. In view of my finding as to the alleged unlawful layoff on August 21, no material issue respecting these discrepancies exists for resolution.

[2] At the hearing, the General Counsel stated that, in any compliance proceeding in this case, the General Counsel will argue that Komorowski's backpay would continue to accrue after mid-September based on the assertion that the contractor, who replaced the Respondent, had hired all the Local 11 and Local 36 ironworkers who were laid off by the Respondent in mid-September, when the Respondent's contract was terminated.

[3] As found above, Fogelman had wanted to get rid of Komorowski for having complained about the delinquencies as to fund contributions but took no action then in view of his foreman's warning that he would be creating a headache for himself by firing the Local 11 steward.

4. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and that it take certain action to effectuate the policies of the Act. The Respondent shall be ordered to make Ronald Komorowski whole for any loss of earnings and benefits he may have suffered as by reason of the discrimination against him. Backpay is to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be provided as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Brandt-Airflex Corp., Readington Township, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in activities on behalf of a labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Ronald Komorowski for any loss of earnings and benefits he may have suffered by reason of his having been unlawfully discharged on August 27, 1982, with interest thereon as set forth in the remedy section of this decision.

(b) Remove from its files all references to the discriminatory discharge of Ronald Komorowski and notify him that this has been done and that evidence of the discrimination will not be used as a basis for any future action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail to each of its ironworker employees who were employed on the Merck project at Readington Township on August 21, 1982, a copy of the attached notice marked ''Appendix''[5] at their last known address, signed by an authorized representative and mail a signed copy to the office of Local 11 for posting by it there if it so chooses.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation that the Respondent unlawfully laid off employees on August 21, 1992 is dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee for engaging in activities on behalf of a labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL make whole, with interest, Ronald Komorowski for any loss of wages and benefits he suffered by reason of our having unlawfully discharged him.

WE WILL notify Ronald Komorowski in writing that we have removed from our files all references to his having been unlawfully discharged and that WE WILL NOT use that discharge against him in any way.

BRANDT-AIRFLEX CORP.